



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Antenna Products Corporation
File: B-236933
Date: January 22, 1990

DIGEST

1. Protest that firm was misled by alleged agency oral advice is denied where even if protester's version of facts were true, the record contains no evidence that protester was placed at a competitive disadvantage by the alleged oral advice.
2. Downgrading of protester's proposal under one of 19 evaluation subcriteria during the best and final offer evaluation was not prejudicial to the protester because it did not materially affect source selection decision.
3. Protest that agency failed to properly follow the source selection plan (SSP) in evaluating offers is denied since SSPs are merely internal agency instructions which do not vest outside parties with rights, and agencies are only required to adhere to the evaluation scheme outlined in the solicitation.
4. Protest that agency failed to timely notify protester of intent to award to another firm is denied where, even though agency erred in not providing timely notice, protester was not prejudiced.

DECISION

Antenna Products Corporation protests the award of a contract to GKS, Inc., under request for proposals (RFP) No. DAAB07-89-R-C217, issued by Army Communications-Electronics Command for radio antenna kits for use by special operations forces. Antenna Products principally argues that the Army misled it with erroneous oral advice, improperly evaluated its proposal, and failed to timely notify the firm of its intent to award to GKS.

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We deny the protest.

The solicitation, a 100 percent small business set-aside, called for the submission of firm, fixed-price offers for base and option quantities of the kits, as well as a price for a spare parts package, first articles and related technical data packages. In addition, the RFP provided that award would be made to the firm submitting the best overall proposal considering technical, cost and management factors, and provided that the technical factors were more important than cost and management factors combined. Within the three broad criteria of technical, cost and management, the RFP specified some 15 technical subfactors and four management subfactors and further provided that firms were required to achieve a rating of no less than acceptable in each of the subfactors in order to be considered for award.

In response to the RFP, six firms submitted initial proposals and, after evaluation, four of the six were determined to be in the competitive range. The agency then engaged in discussions with these four firms and subsequently requested the submission of best and final offers (BAFOs). After the evaluation of BAFOs, the agency decided to award to GKS as the firm submitting the best overall proposal; the contract was awarded to that firm on August 31, 1989. Thereafter, by letter dated August 31, postmarked September 6, and received by Antenna Products on September 11, the Army informed Antenna products of the award to GKS. This protest followed.

Antenna Products first alleges that the Army misled it during its solicitation of BAFOs. In this regard, Antenna Products alleges that the contract specialist, in connection with the Army's solicitation of BAFOs, told the firm that prices were close, the competitive range was comprised only of technically qualified offerors and that all that was needed in connection with BAFOs was "for everyone to sharpen their pencils." Antenna Products alleges that, as a result of these statements, it was incorrectly led to believe that all firms remaining in the competitive range were technically equal and that cost had become the paramount consideration for award purposes. In support of its allegation, Antenna Products has provided affidavits executed by its contract negotiators attesting to the fact that the Army's contract specialist made these statements.

The Army specifically denies that any statements to this effect were made by its contracting personnel. The Army also has furnished affidavits executed by the agency's contracting officer and contract specialist specifically denying the allegation.

In our opinion, we need not resolve this factual dispute between the parties in order to conclude that Antenna Products' allegation does not serve as a basis to sustain its protest. First, we do not think that Antenna Products' interpretation of these alleged statements was reasonable. We fail to see how being told to "sharpen [its] pencils" necessarily equates to all firms in the competitive range being technically equal or that cost had become the paramount factor for award purposes. Second, the record contains no evidence that the protester was placed at a competitive disadvantage by the alleged oral advice of the contract specialist, that is, that the protester would have submitted a different proposal had the firm not received such alleged oral advice.

Antenna Products next argues that the Army improperly evaluated its proposal by rescoring its BAFO in various areas which had not been the subject of discussions. In this respect, Antenna Products argues that the technical evaluation panel (TEP) significantly reworded the narrative portions of its report to the source selection authority for a number of the subfactors which were not the subject of discussions with the firm. In addition, Antenna Products points out that, for one of the technical subfactors, "understanding of the requirements," the TEP's actions resulted in the firm's being downgraded from an adjectival rating of "outstanding" for its initial proposal to "acceptable" for its BAFO.

We have examined the record in this case and conclude that there was nothing improper in the Army's evaluation of Antenna Products' BAFO. First, we point out that FAR § 15.611(d) (FAC 84-51) specifically requires the evaluation of BAFOs in addition to evaluation of initial proposals and does not limit the evaluation to the items that have been the subject of discussions. Second, we do not think that the Army's rescoring of Antenna Products' BAFO materially affected the source selection determination. In particular, we note that the firm's adjectival rating changed for only three of the evaluation subcriteria. For two of those subcriteria, "materials and facilities" and "maintenance," Antenna Products had received initial scores of only "susceptible," and those ratings were elevated to "acceptable" after the TEP examined the firm's answers to discussion questions relating specifically to those areas. For the remaining subcriterion, "understanding the requirements," Antenna Products' initial rating of "outstanding" was downgraded to "acceptable" after BAFOs were evaluated. Overall, therefore, Antenna Products' proposal was rated "acceptable" for each subcriterion. In contrast, GKS' proposal was rated "outstanding" in 12 out of

the 19 subcriteria and received an aggregate rating of "outstanding." Thus, even if Antenna Products' adjectival rating for the "understanding the requirements" subcriterion had remained "outstanding," the record clearly shows that the source selection determination would have remained the same since it was firmly based on the significant technical superiority of the GKS proposal. We therefore see no basis to sustain Antenna Products' protest on this ground.

Antenna Products also contends that the Army misapplied the source selection plan (SSP) in its evaluation of GKS. The protester argues that the SSP by its terms precluded the scoring of any proposal as "outstanding" and that the TEP erred in awarding GKS' proposal an adjectival rating of "outstanding" in any of the enumerated evaluation criteria and subfactors. In support of this allegation, Antenna Products directs our attention to section 5 of the SSP which provides:

"Rating procedure - A rating of Acceptable and Unacceptable will be used. Each evaluator will evaluate each offeror's proposal using the subfactors as the guideline. A narrative rating will be ascribed to each technical subfactor."

According to the protester, this language in the SSP precluded the assignment of any adjectival rating other than "acceptable and unacceptable."

There is no merit to this argument. The SSP was not a part of the RFP. As we have previously noted, SSPs are in the nature of internal agency guidance and as such do not give outside parties any rights. Pan Am World Servs., Inc., B-235976, Sept. 28, 1989, 89-2 CPD ¶ 283. It is the evaluation scheme in the RFP, and not any internal documents an agency has, to which the agency is required to adhere. Id. Moreover, the record indicates that the agency's evaluation was consistent with the RFP.

Antenna Products next argues that the Army improperly made award to GKS in light of that firm's significantly higher proposed cost. In this regard, the protester alleges that the RFP called for award to the lowest priced technically acceptable offeror because it provides that firms must receive a rating of no less than "acceptable" in each evaluation area. According to the protester, this language, when read in conjunction with the provision of the SSP relating to the rating procedure quoted above and with the

oral advice it received, required the Army to make award to the lowest priced technically acceptable offeror.^{1/}

In a negotiated procurement, the government is not required to make award to the firm offering the lowest cost unless the RFP specifies that cost will be the determinative factor. Univ. of Dayton Research Inst., B-227115, Aug. 19, 1987, 87-2 CPD ¶ 178. Here, as stated above, the RFP specifically contemplated a comparative technical evaluation of proposals with award to the "best overall proposal," with technical factors more important than cost and management factors combined. Further, we think that the Army made a reasonable cost-technical tradeoff in awarding to GKS, and was legally entitled to do so under the RFP's terms. In particular, we note that both the source selection determination as well as the TEP's final report indicate that, while the other three competitive range offerors submitted technically acceptable proposals, the proposal submitted by GKS offered a technically superior approach, and, although higher priced, represented a substantially lower risk of performance than those of the other firms. There is no evidence in the record to show otherwise.

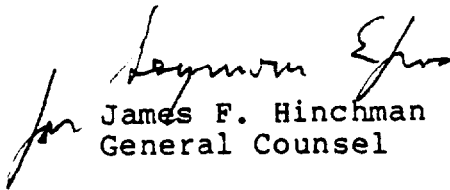
The protester finally alleges that the Army failed to timely notify it of its intent to award to GKS in accordance with FAR § 15.1001(b)(2) (FAC 84-13), which requires agencies to provide unsuccessful offerors with notice of the agency's intent to make an award prior to actually doing so in cases where the requirement has been set aside for small business.

The Army's failure in this respect is merely a harmless procedural error which does not affect its otherwise valid award. The purpose of the notice requirement is to provide unsuccessful offerors an opportunity to challenge the prospective awardee's size status for the procurement at hand. See Fidelity Technologies Corp., 68 Comp. Gen. 499 (1989), 89-1 CPD ¶ 565.

^{1/} Antenna Products also argues that the Army could not properly award to GKS because GKS allegedly failed to provide option prices and a price for the optional spare parts, as required by the RFP. The protester bases its allegation on the fact that the final award document does not show prices for these line items. We have reviewed both firms' proposals and point out that both GKS and the protester submitted identical pricing structures which included prices for the option quantities and optional spare parts packages.

Here, the Small Business Administration's Office of Hearings and Appeals is considering Antenna Products' size appeal against GKS, and the ruling will be applicable to the instant procurement. Consequently, we cannot conclude that Antenna Products was materially prejudiced by the Army's failure to provide it with timely notice of its intent to award to GKS.^{2/} Since we will only sustain a protest on this basis where a firm is prejudiced by the agency's failure to provide the required notice, FKW Inc. Sys.; ColeJon Mechanical Corp., B-235989; B-235989.2, Oct. 23, 1989, 89-2 CPD ¶ 370, we have no basis to sustain the protest here.

The protest is denied.


James F. Hinchman
General Counsel

^{2/} We also note that the agency suspended performance of GKS' contract pending resolution of this protest.